Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4981

WILLIAM B. DAWSON, III,
Petitioner,

-vs-

THE FLORIDA BAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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October, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

DESIGNATION OF PARTIES

Petitioner, WILLIAM B. DAWSON, III, will be called DAWSON.

Respondent, THE FLORIDA BAR, will be called THE BAR.

OPINIONS BELOW

The Florida Supreme Court Opinion – announcing Dawson's disbarment – has not been reported. A copy is included in the Appendix.

The Referee's report recommending disbarment – was not published officially. A copy however, is included in the Appendix.

The Opinion of The Florida District Court of Appeal, First District in *State v. Dawson* – a companion case – approving suppression of certain evidence seized under an invalid search warrant – is reported in 276 So.2d 65 (1973). A copy is included in the Appendix.

DENIAL OF RE-HEARING

Dawson's Petition for Re-hearing was filed August 7, 1975 – and denied by Order dated *Sept. 11, 1975.* Copies of the Petition and the Order of Denial are included in the Appendix.

JURISDICTIONAL STATUTE

Jurisdiction is conferred by 28 U.S.C. 1257 (3)

QUESTIONS PRESENTED

QUESTION ONE: WHETHER PLAIN ERROR INFECTS A DISBARMENT PROCEEDING – RENDERING IT INHERENTLY SUSPECT – FOR PROSECUTORIAL MISCONDUCT PRECLUDING A FAIR TRIAL – WHERE THE ACCUSED ATTORNEY IS KNOWN, PROMINENTLY AS A PLAINTIFFS' ADVOCATE IN PERSONAL INJURIES CASES – AND THE RECORD SHOWS THE PROCEEDING WAS

INSTIGATED, AND THE PROSECUTION MANAGED, BY SPECIALLY APPOINTED BAR COUNSEL KNOWN, EQUALLY PROMINENTLY, FOR REPRESENTATION OF INSURANCE COMPANIES IN PERSONAL INJURIES CASES – AND WHERE THE RECORD FURTHER SHOWS THAT THE CENTRAL CHARGE AGAINST THE ACCUSED ATTORNEY – viz MAKING "ADVANCEMENTS" TO CLIENTS – WAS INVESTIGATED AND FRAMED AS WELL AS PROSECUTED, BY SUCH BAR COUNSEL – AND WHERE THE RECORD, FURTHER, SHOWS THAT TWO FORMER CLIENTS OF THE ACCUSED ATTORNEY TESTIFIED IN THE PROCEEDING, AS TO "ADVANCEMENTS" MADE TO THEM – AND WHERE THE RECORD, FURTHER, SHOWS THE APPEARANCE OF SUCH FORMER CLIENTS OF THE ACCUSED ATTORNEY AS WITNESSES AGAINST HIM HAD BEEN ARRANGED BY BAR COUNSEL WHO, BEFOREHAND, HAD SUMMONED THEM, BY SUBPOENA TO HIS PRIVATE LAW OFFICE FOR INTERROGATION AS TO WHAT THEY KNEW AND WOULD TESTIFY TO – AND WHERE THE RECORD FURTHER SHOWS THAT

IN THE PERSONAL INJURIES ACTIONS' BROUGHT BY THE ACCUSED ATTORNEY, ON BEHALF OF SUCH FORMER CLIENTS, BAR COUNSEL HAD BEEN ADVERSARY ATTORNEY OF RECORD FOR THE DEFENDANT INSURANCE COMPANIES – AND WHERE THE RECORD, FURTHER, SHOWS THAT NOTWITHSTANDING HIS PECUNIARY INTEREST IN THE PROCEEDING'S OUTCOME, AS DEMONSTRATED BY ALL THE FOREGOING RECITALS, BAR COUNSEL, ON OBJECTION OF THE ACCUSED ATTORNEY, DECLINED TO CONCEDE IMPROPRIETY AND DISQUALIFY HIMSELF FROM PARTICIPATION IN THE ACCUSED ATTORNEY'S TRIAL – AND WHERE THE RECORD FURTHER SHOWS, THE PRESIDING REFEREE REFUSED TO COMPEL DISQUALIFICATION.

QUESTION TWO: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – IS DENIED DUE PROCESS – (1) FOR CONVICTION ON A CHARGE NEVER MADE and (2) FOR CONVICTION UNDER AN EX POST FACTO LAW – WHERE THE COMPLAINT CHARGES HIM WITH MAKING "ADVANCEMENTS" TO CLIENTS IN VIOLATION OF CERTAIN CANONS – BUT WHERE THE

REFEREE CONVICTS HIM OF VIOLATING AN ENTIRELY DIFFERENT CANON – AND WHERE THE STATE SUPREME COURT, REVIEWING THE CONVICTION, UPHOLDS IT, ON THE THEORY IT VIOLATES NEITHER THE CANONS CHARGED IN THE COMPLAINT: NOR THE CANON INVOKED BY THE REFEREE, BUT AN "ETHICAL CONSIDERATION" MERELY ASPIRATIONAL IN NATURE – AND WHERE SUCH ETHICAL CONSIDERATION WAS NOT IN EXISTENCE AS OF THE DATES ON WHICH THE ALLEGED "ADVANCEMENTS" WERE MADE BY THE ACCUSED ATTORNEY.

QUESTION THREE: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – IS DENIED DUE PROCESS – FOR WANT OF FAIR NOTICE THAT HIS ACTS MIGHT BE DEEMED PROFESSIONAL MISCONDUCT WARRANTING DISBARMENT – WITHIN THE MEANING OF MR. JUSTICE WHITE'S CONCURRING OPINION IN *RUFFALO*[1] – WHERE THE ACCUSED ATTORNEY IS CHARGED AND CONVICTED OF

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1 *In the matter of John Ruffalo* 390 U.S. 815, 19 L.Ed.2d 66, 88 S.Ct. 30(1967)

MAKING "ADVANCEMENTS" TO CLIENTS – NOTWITHSTANDING THAT AT THE TIME HE MADE THEM, THEY WERE NOT CONDEMNED AS UNAUTHORIZED, UNDER THE SETTLED DECISIONAL LAW OF THE SUBJECT JURISDICTION, NOR MOST AMERICAN JURISDICTIONS, GENERALLY.

QUESTION FOUR: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – CHARGED WITH "CUSTOMARILY AND ROUTINELY" MAKING "MONETARY ADVANCEMENTS – TO CLIENTS FOR PURPOSES OTHER THAN EXPENSES OF LITIGATION" DURING A THREE AND A HALF YEAR PERIOD – TERMINATING AS OF THE DATE THE DISBARMENT PROCEEDING WAS COMMENCED – IS VICTIMIZED BY DENIAL OF DUE PROCESS – FOR LACK OF EVIDENCE IN THE RECORD TO SUPPORT A RATIONAL CONCLUSION OF GUILT – WITHIN THE MEANING OF *SCHWARE*[2] AND *THOMPSON*[3] WHERE THE EVI-

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2 *Schware* v. *Board of Bar Examiners* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796(1959)

3 *Thompson* v. *Louisville* 362 U.S. 199, 808 S.Ct. 624, 4 L.Ed. 2d 654(1963)

DENCE CONSISTS, ENTIRELY, OF THE TESTIMONY OF TWO FORMER CLIENTS AND A FORMER EMPLOYEE OF THE ACCUSED ATTORNEY – AND WHERE THE TESTIMONY OF ONE OF THE FORMER CLIENTS WAS THAT HE RECEIVED ONE "ADVANCEMENT" OF ONE HUNDRED DOLLARS ON A DATE TWO AND A HALF YEARS PRIOR TO COMMENCEMENT OF THE DISBARMENT PROCEEDING – AND WHERE THE OTHER FORMER CLIENT'S TESTIMONY WAS THAT SHE HAD RECEIVED ADVANCEMENTS OF FIFTY DOLLARS PER WEEK – FOR "ABOUT TWO MONTHS" – WHILE SHE WAS DISABLED TO WORK – AND SUCH ADVANCEMENTS WERE MADE TWO AND A HALF YEARS PRIOR TO COMMENCEMENT OF THE DISBARMENT PROCEEDINGS – AND WHERE THE FORMER EMPLOYEE'S TESTIMONY WAS THAT SHE OBSERVED WEEKLY ADVANCEMENTS MADE TO CLIENTS WHOSE NUMBER SHE COULD NOT "BEGIN TO GIVE . . . AN IDEA" OF – BUT MIGHT HAVE BEEN "A HUNDRED, A COUPLE OF HUNDRED" – ALTHOUGH SHE DID NOT RECALL THE NAME OF A SPECIFIC CLIENT TO WHOM – NOR A SPECIFIC DATE ON

WHICH – AN ADVANCEMENT WAS MADE – NOR THE PURPOSE FOR WHICH IT WAS MADE – AND WHERE BOTH FORMER CLIENTS TESTIFIED THAT THE ADVANCEMENTS HAD BEEN MADE TO THEM SUBESEQUENT TO THEIR EMPLOYMENT OF THE ACCUSED ATTORNEY – AND THAT SUCH ADVANCEMENTS HAD NO CONNECTION, AT ALL, WITH THEIR DECISIONS TO EMPLOY HIM – NOR TO CONTINUE HIS EMPLOYMENT.

QUESTION FIVE: WHETHER AN ACCUSED ATTORNEY – IN A DISCIPLINARY PROCEEDING – MAY BE CONVICTED AND DISBARRED – CONSISTENT WITH *SCHWARE* AND *THOMPSON* – ON A CHARGE OF "RECEIVING STOLEN PROPERTY". – NOTWITHSTANDING A CONCESSION BY THE STATE COURT, OF FINAL REVIEW, THAT THE EVIDENCE WAS SO "CIRCUMSTANTIAL AND UNCONVINCING THAT IT WOULD NOT WARRANT CONVICTION AND DISBARMENT" – EXCEPT CONSIDERED, CUMULATIVELY, WITH ANOTHER "PROVEN CHARGE".

QUESTION SIX: WHETHER THE SIXTH AMENDMENT GUARANTEE – THAT *"IN ALL CRIMINAL PROSECUTIONS,* THE ACCUSED SHALL ENJOY THE

RIGHT TO A . . . PUBLIC TRIAL, BY AN IMPARTIAL JURY" . . . TOLERATES A SECRET TRIAL WITHOUT A JURY – IN A *QUASI-CRIMINAL PROSECUTION,* THAT IS: IN A DISBARMENT PROCEEDING–MOST PARTICULARLY, WHERE AS HERE, THE ACCUSED ATTORNEY – IN SUCH A PROCEEDING–IS CHARGED AND CONVICTED OF THE COMMISSION OF A CRIME – i.e., "RECEIVING STOLEN PROPERTY"–NOTWITHSTANDING *THAT A COURT OF COMPETENT JURISDICTION,* PREVIOUSLY, HAD ENTERED A NOLLE PROSEQUI DISMISSAL – IN THE ATTORNEY'S FAVOR – AS TO THE SAME, ALLEGED CRIMINAL TRANSACTION – FOR WANT OF EVIDENCE.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND CASES INVOLVED

The Constitutional, Statutory and like provisions implicated in this Controversy are too numerous and lengthy to set out verbatim, here, but all are included in the Appendix.

Meanwhile, their citations are:

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Rule 11:02 of Article XI of the Integration Rule of The Florida Bar.

The oath of Admission prescribed for Attorneys by the Integration Rule of the Florida Bar.

Canon 10 . . . of the Canons of Professional Ethics, as adopted by The Florida Supreme Court, December 6, 1955, and Amended, November 17, 1958, March 25, 1964 and May 11, 1966.

Rules 27 and 32 of the Additional Rules Governing the Conduct of Attorneys in Florida.

Canons 1 and 5 of the Code of Professional Responsibility, adopted by the Florida Supreme Court October 1, 1970.

STATEMENT OF THE CASE

Dawson seeks review of a Florida Supreme Court Disbarment Judgment – purporting to approve a *Referee's* findings of guilt on two charges – which stated, telescopically, were: 1. Making "Advancements" to Clients and 2. Receiving stolen property.

To be precise, however, it cannot be said that conviction on the second charge was approved, except ambiguously and conditionally, inasmuch as the covering opinion contains a caveat – tantamount to a partial disclaimer – saying, *Because this finding is based . . . on circumstantial evidence . . . We would not be inclined to disbar . . . (Dawson) if this were the only offense . . . charged.*"

ORIGINAL COMPLAINT

The Bar's Complaint originally was in six Counts. (A-1) each specifying a separate charge – but The Bar abandoned and consented to dismissal of Counts I, V and VI, without offer of proof – and the Referee directed a verdict on Count II – when the sole prosecution witness' testimony, in effect, denounced its essential allegations as invention – and exonerated Dawson.

The surviving Counts III, and IV went to trial and final verdict.

FACTS RELEVANT TO COUNT III, CHARGING "ADVANCEMENTS" TO CLIENTS.

In material part, Count III charged Dawson as follows:

> "1. From on or about January 1, 1969, up to and including the present time, the accused attorney has customarily and routinely made monetary advances to his clients for purposes other than expenses of litigation."

The evidence presented, by the Bar, on Count III, consisted of the testimony of three witnesses – two former clients – and a former employee – of Dawson's.

The testimony of each of them summarized, fairly and fully, was as follows:

Lucious Pryor's Testimony on Direct

Pryor testified, on direct examination:

"That on April 23, 1970 he was injured in an automobile

accident. (R-35)

That his 1970 Nova automobile was "lost" in the accident (R-35) and his injuries included facial cuts and the near loss of his left eye (R-36) – requiring him to lose forty-one (41) days from work. (R-35)

That about a week later he retained Dawson to represent him (R-36-37) and sometime thereafter Dawson gave him One Hundred Dollars ($100.00). (R-37-38)

That Dawson "asked me did I need any money" (R-38) and "I told him yes" (R-38) whereupon he received "a hundred dollar check . . ." (R-39)

That he had not "asked . . . Dawson for money" (R-39 – but needed the hundred dollars (R-38) – and used it to buy "two automobile tires" (R-41) although he did not tell Dawson what he used it for. (R-41-42)

That "other than . . . the . . . hundred dollars" Dawson had furnished him no money (R-39) except "a twenty-four dollar check . . . to give to the doctor"; (R-39)

That his case was lost before a jury (R-40)

That he "did not ever give . . . Dawson the hundred dollars back" (R-40) and Dawson had not asked him for it (R-40) nor sued to recover it; (R-40)

Pryor's Testimony on Cross

On cross-examination, Pryor testified:

. . . *"At the time . . . (he) retained . . . Dawson . . . no commitment or promises 'were made' to pay . . . (him) any money to get . . . (Dawson) to represent . . . (him)"*

(R-43) – that the employment of Dawson *was his "voluntary choice" (R-43) – that there was "no inducement . . . to pay . . . (him) money to let . . . (Dawson) handle his case." (R-43-44)*

That the transaction in which Dawson had furnished him the hundred dollar check had taken place "over four and a half years" previously – and he could not remember, specifically, what he had said or what Dawson had said, at the time, but he was certain "the . . . hundred dollars had nothing to do with . . . (Dawson's) taking his case or retaining it". (R-44-46)

That he did remember that "when . . . (his) case was tried in court . . . (Bar Counsel) – sitting beside him, now, as Dawson's prosecutor, had "represented the insurance company". (R-49)

That, moreover, the same Bar Counsel had used a subpoena to call him in – in 1974 – to ask him about "the fact that . . ." Dawson had given him one hundred dollars. (R-48-50)

That Bar Counsel had "interviewed" him "a second time" about the same matter – and that Bar Counsel was the only person who had "interviewed" him. (R-49-50)

That he had . . . paid out in medical expenses . . . far in excess of the one hundred dollars . . . (Dawson) had advanced . . . (him)". (R-56-57)

Pryor's Testimony on Re-Direct

Pryor testified on re-direct examination:

That "the hundred dollars . . . (Dawson) gave him . . . (did not) have anything to do with paying for any of . . . (his) eye problems or anything". (R-58)

That as to "the conversations . . . (he had) had with . . . (Bar Counsel)[4] about this hundred dollar advancement . . . (he did not) really recall exactly when the date of that was". (R-59)

That he did not recall "how long after . . . (his personal injury) case was lost before . . . (Bar Counsel) sent . . . (him) a subpoena and . . . (he went) to . . . (Bar Counsel's) Office . . . to talk to . . . (Bar Counsel) about "the advancements"; (R-59) – but "It was over three years". (R-59-64)

Pryor's Testimony on Re-Cross

On re-cross examination, Pryor testified:

That "the first time he had talked to . . . Bar Counsel" about the advancement from Dawson, "was after his case was lost" (R-60) "about three years after it was tried". (R-60)

That he had "paid out in expenses for doctors and all (far . . . in excess) of the . . . hundred dollars . . . Dawson had advanced him" (R-62) – that Dawson had paid twenty-four dollars on his doctor's bill but he had paid all the rest amounting to "between five and six hundred dollars all together". (R-62-65)

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4 To verify that Bar Counsel was the same lawyer who had represented the insurance company, in his personal injuries case, and, thereafter, interrogated him about the $100.00 "advancement" – Pryor turned to the Bar Counsel and asked "Was you the same Man?" – to which Bar Counsel responded, tersely, "yes." (R-49)

Teresa Jean Whatley's Testimony

On direct examination, Mrs. Whatley testified:

That she had been in an automobile accident on Christmas Eve 1969 (R-66) while a passenger in a taxi cab (R-66-67) and had sustained back and neck injuries (R-66-67) – and a week later retained Dawson to represent her. (R-67-68)

That about "a month after . . . (she) started discussing the case with him" – he gave her "a salary replacement check until . . . (she) could go back to work" (R-69) – that she thought the amount was approximately sixty or sixty-five dollars (R-69) that Dawson continued making these payments to . . . (her) "on a weekly basis" (R-70) – that she would "pick it up every Monday" (R-70) – that such payments were received "for about two months". (R-70)

That, in the end, her lawsuit was lost at trial. (R-77)

That she had never "repaid that money" to Dawson – that he had never asked for repayment – and had never sued her for it. (R-79)

That she had used the money for "the normal things . . . (she) did when (she) was working and got . . . (her) check". (R-80)

That she "lived off, that money" (R-80) buying "food and groceries" and paying the "phone bill". (R-80)

That " during this period of time" . . . (her father's job went on strike and . . . (she) tried to help out . . . with . . . (her) mother too" (R-80) – that she would buy some groceries for them. (R-80

That Bar Counsel (who had represented the insurance company in the lawsuit she had lost) (see R-10-20) called her

later to appear before him "to testify" about "advancements"; (R-80-81)

That she called Dawson – and told him she "had got a subpoena and . . . read . . . him over the phone what the subpoena said" (R-81)

That she asked Dawson "what it was all about" (R-81) and "He said it was concerning the money . . . he had loaned her . . . during the time . . . (she) was his client" (R-81) and she "told him he didn't loan . . . (her) no money because it was a salary replacement, and we exchanged words about it"; (R-81)

That Dawson, "at the time he was giving her this money on a regular weekly basis," had told her that "after the case come up and when we win the suit that that money would be reimbursed out of the proceeds of the suit"; (R-82)

Mrs. Whatley's Testimony on Cross

On Cross examination, Mrs. Whatley testified:

That the "question about the salary replacement "came up about a month after . . . (Dawson) took . . . (her) case" (R-85) that . . . "the advancing of . . . money . . . had nothing to do with . . . Dawson taking . . . (her) case" (R-85) that she "retained him to represent . . . (her) without any discussion of money or anything of that nature"; (R-85) and that "it had nothing to do with him continuing to represent . . . (her) in the case"; (R-85-86)

That her injuries had disabled her to work for "about eight or ten weeks" (R-86) – that she "had to have somebody help . . . (her) with . . . (her) children for a while" (R-86) – and she had told Dawson about it; (R-86)

That when she . . . "would go to the Doctor's office or down to . . . Dawson's office . . . (she took) a cab back and forth" (R-88) and she told Dawson "that that was expensive for . . . (her)." (R-88)

That she had to have " . . . medication and prescriptions in conjunction with the presentation of . . . (her) case and the treatment of . . . (her) injuries" (R-88) and she told Dawson she had "to pay for those things" (R-88)

That she did not remember specifically, that she told Dawson "that she needed money to help with these expenses" (R-88-89) but she "could have" told him (R-89) and, in all events, "Dawson did help . . . (her) pay them"; (R-88)

That she had testified she had received "sixty or sixty-five dollars a week from Dawson but (she) did not remember, clearly, what the amount was – and The Bar Association . . . information," furnished Dawson's attorneys, she assumed, was accurate, viz she had received fifty ($50.00) Dollars a week from Dawson, for eight weeks. (R-90-91)

That the payments from Dawson were stopped after eight weeks – but she could not recall whether they were stopped because Dawson told her she was able to return to work. (R-93-95)

Mrs. Whatley's Testimony on Re-Direct

On re-direct examination, Mrs. Whatley testified:

That she was not sure who designated the payments made to her as "salary replacement" (R-95-96) nor did she remember "how it came up or who suggested or mentioned or how the idea or the fact of regular weekly monetary advance-

ments came up in the first place" (R-96) or "who mentioned it first". (R-96)

Joan Clark's Testimony

After Ms. Clark was sworn – but before she had testified to more than the rituals as to name and address – and the like – an extended colloquy – consuming twenty-nine pages of record[5] took place – among Dawson, Bar Counsel and the Referee – swirling around Dawson's objection to her testimony, the essence of which was – that the original charge, as alleged in the Bar's Complaint, was that Dawson had "customarily and routinely" made unauthorized "advancements" to clients – over a period of almost four years – i.e., from January 1969 to November 13, 1972 when the Complaint was filed – that the charge, as made, had been too vague and protean to put him on notice adequate to enable him to prepare his defense -- that he had sought to dismiss it – failing in which, he had sought to compel the Bar to flesh it out with particulars by a Motion for More Definite Statement and Discovery – that in response to a second set of Interrogatories, asking the dates, times, places and amounts of "advancements" made, and the identities of the clients to whom they were made – The Bar itemized "advancements" made to Pryor, Mrs. Whatley and Joseph Herman . . . that The Bar, subsequently, renounced its response as to Herman, leaving only, the "advancements" to Pryor and Mrs. Whatley to be reckoned with – that he had prepared his defense, accordingly, and that the Bar should be bound, accordingly – that he understood Ms. Clark's testimony would not deal with the Pryor-Whatley episodes but, would be random and discursive – that he would be taken by surprise and denied due process – within the reach of *Ruffalo* – if she were permitted to testify – that, indeed, *Ruffalo* was in point, exactly, holding that where an accused lawyer is confronted with amended charges, after disbarment proceedings begin, "They became a trap" – repugnant to "fair notice" and "procedural due process" (R-153-182)

5 Pages 153 to 182.

Bar Counsel and the Referee were unimpressed with *Ruffalo* – Bar Counsel contending, astoundingly, that *"We are not bound to put on testimony about specific individuals, specific amounts insofar as this Count three is concerned because of the way it's drawn"* (R-159) and the Referee opining, equally astoundingly, that "in keeping with the spirit of the Integration rule . . . the Florida Bar . . . (should) not be prevented from introducing . . . evidence of . . . misconduct . . . up to and including the day of the hearing . . ." – whether alleged in the complaint or not. (R-161)

Dawson's objection was overruled.

Ms. Clark's Testimony on Direct

Whereupon, on direct examination, Ms. Clark testified:

That she had been employed by Dawson, as a legal secretary, from August 1969 to March 1971 (R-152) and had "knowledge" about "Dawson giving monetary advancements to . . . clients". (R-152)

That "during the time she worked for . . . Dawson," she "daily" saw him "instruct . . . secretaries . . . to make monetary advancements to clients". (183-185)

That "generally" she stayed "in the back" of Dawson's office (R-189) where she was "i a position to know or see advancements when they were given" (R-189) but, only, "occasionally". (R-189)

That "normally" advancements were made on "Friday" (R-189) – that she did not "know if – (she) could begin to even give an idea," as to "how many clients would come in on Fridays to receive monetary advancements" (R-189) – but she "could . . . just say hundreds" (R-189) "over a hundred, a couple hundred". (R-190)

That "there was a system . . . in the office, for repayment of these monetary advances" (R-193) that the "system" was that "on a closing statement when a case was closed . . . advances would be pulled and . . . deducted from . . . the settlement" (R-194) and "the cases . . . (she) worked with . . . that were lost would be written on the outside of the files, and the advancements would be . . . inserted in the file" (R-195) and as far as she knew the "advances . . . in those cases" were not repaid. (R-195)

That she *"could not remember any dates or places" as to Advancements "because there's been too large . . . a lapse of time" (R-196) that as to "dates, places . . . (or) amounts . . . (she could not) be specific on any of that". (R-196)*

That "maybe five or maybe a little bit more than that" (R-198) she had overheard Dawson "tell a client that this will be money for you while you're off work or while you're going to a doctor". This testimony was based on "I can't remember his exact words" and "that is just an assumption and conclusion from a conversation" that she heard from "somebody" she doesn't even "know". (R-229-230)

That at times she heard both "Dawson" and "Becky"

(Rebecca Salter, Dawson's Secretary) refuse to make advances to clients. (R-192) In her testimony (R-189) "Q: How many clients would come in on Fridays to receive monetary advancements? A: I don't know if I could begin to even give you an idea . . ." It is impossible to tell from her testimony whether any clients seeking money, *actually got it*.

Aside from the ambiguous testimony in the preceding paragraph, there is no evidence in the entire record of her testimony, that Dawson violated Section EC5-8, which states: "Although the assistance is not encouraged, there are instances when *it is not improper* to make loans to a client."

On Cross Examination, Ms. Clark Testified:

That when she "was told to write a check for an advance . . . that's all . . . (she) was told" (R-219) that she did not "know what the check was for" (R-219) that "it could have been . . . for any purpose" (R-219) that she did not know "whether it was for medical bills, to buy a brace, to pay a doctor, to pay for transportation . . . or anything else". (R-219-220)

That neither did she know . . . whether a client "repaid advances" (R-220) that at the "time of settlement of . . . (a) case . . . (she) would see advances repaid" (R-220) – but she had no "knowledge" about whether advances made in lost cases were repaid. (R-221)

Ms. Clark's Testimony, on Re-Direct

On the re-direct examination, Ms. Clark testified:

That she could "remember one specific occasion" when she heard Dawson discuss the purpose of an advancement to a

client (R-225-228) that she had "no idea when it occurred" (R-228) but could "remember . . . Dawson . . . (had) a conversation with . . . (a) client, and the client . . . indicated . . . (he could not) take off work . . . and go see a doctor because . . . (he wouldn't) have any money coming in" (R-228-229) – and Dawson "told the client that . . . (he would) give . . . (the client) monetary advancements while . . . off work"; (R-229)

That she could remember "that type of conversation" "one specific time" only (R-229) and she could not "recall when that one occurred . . . (or) the name of the client". (R-229)

Ms. Clark's Testimony on Re-Cross

On re-cross examination, Ms. Clark testified:

That in testifying she had heard Dawson tell a client he would make advancements to him while he was "off work", she had not meant to suggest those were Dawson's exact words (R-229-230) but it was "just . . . (her) assumption and conclusion from a conversation . . . (she) heard from somebody, that . . . (she didn't) even know who was present or the date . . . it occurred or anything else". (R-230)

That "*all . . . (she was) giving . . . (was) a fragmented part of a conversation with an unknown individual on a date uncertain and the words . . . (she) used . . . (were her) conclusions based upon overhearing part of a conversation.*" (R-232)

FACTS RELEVANT TO COUNT IV CHARGING DAWSON WITH RECEIVING STOLEN PROPERTY

On or about March 31, 1972, Dawson's home and office were raided, as it were, by police officers, acting under color

of a search warrant, and three electric typewriters were seized, identified, by their serial numbers, subsequently, as having been stolen from the local branch of the Virginia Paper Company. (R-116)

Dawson was charged, criminally, with receiving stolen property, under Florida Statute, Section 811.16, but, the trial Court condemned the Search Warrant, and suppressed use of the seized typewriters – a ruling upheld by Florida's District Court of Appeal, First District. *State* v. *Dawson*, 276 So.2d 65 (1973).

A nolle proseque dismissal was entered for lack of evidence. But the Bar was not deterred – and Count VI of the Complaint filed against Dawson charged, in material part:

> 1. That on or about March 31, 1972, the accused attorney, William B. Dawson, III, did unlawfully and feloniously receive and aid in the concealment thereof, certain stolen property, to-wit: two IBM Electric typewriters and one Remington Electric typewriter, "both" the property of Virginia Paper Company, a corporation; and one SCM Marchant Adding Machine, the property of Mercedes Benz, Inc., a corporation. The accused attorney, WILLIAM B. DAWSON, III, knew that said property was stolen.

And, at trial, before the Referee, two witnesses were called to prove the charge – the thief, Howard McGee, and the Virginia Paper Company Branch Manager, David Maddox.

The testimony of each of them, is summarized, fully and fairly as follows:

McGee's Testimony on Direct

On direct examination, McGee testified:

That in February or March 1972 he "took" a typewriter, by theft, and sold it to Dawson; (R-105-107)

That he did not "recall the circumstances" surrounding the theft (R-106) nor even "what kind of typewriter it was"; (R-106)

That however, he took it to Dawson's office (R-106) where after examination to determine its workability – and a discussion of "money", Dawson bought it. (R-106-107)

That he was "not sure" about the amount paid by Dawson, but believed "it was seventy-five dollars". (R-106-107)

That he asked whether Dawson needed more typewriters – and was told yes. (R-107)

That "maybe two or three days later, a week" he stole another typewriter, and sold it to Dawson (R-107-108) although he could not recall, again, where he had stolen it. (R-107-108)

That, in a third episode, he stole three typewriters, from the Virginia Paper Company. (R-116)

That he, thereupon, "got . . . (the) address out of the phone book" (R-112) and delivered them to Dawson's house. (R-112-113)[6]

That he did not see Dawson, at his home, and did not know whether he was there. (R-116)

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6 Dawson's objection – that the complaint charged him with receiving three typewriters, specifically identified, and the Bar was seeking to prove he had received five – two of them unidentified – was overruled (R-114-115)

That, the next day, he went to Dawson's office where they had a conversation, about the three typewriters, and Dawson "said . . . he didn't need that many typewriters and offered twenty-five dollars for me to go and get them". (R-116-117)

That nevertheless, they "compromised and . . . came up with a price of a hundred and fifty dollars for . . . (Dawson) to keep two of the typewriters and I was supposed to go back and get one . . . which I never did . . ." (R-116-117)

McGee's Testimony on Cross

On cross examination, McGee testified:

That he did not "tell . . . (Dawson) the typewriters were stolen". (R-118-120)

That he had known Dawson before the typewriter "dealings," having been his client in an "accident case". (R-119-120)

McGee's Testimony on Re-Direct

On re-direct examination, McGee testified:

That he had taken the three typewriters, stolen from Virginia Paper Company, to Dawson's house "about 10:30, eleven o'clock" the same night he stole them (R-121) and visited Dawson's office the next morning "about nine o'clock" to sell them. (R-121)

Maddox's Testimony on Direct

On direct examination, Maddox testified:

That when he opened the Virginia Paper Office, on March

31, 1972, he discovered the theft of the three typewriters – two IBM's and a Remington. (R-236-239)

That in his opinion, the two IBM's were worth $500.00 each and the Remington $200.00. (R-247-248)

Maddox's Testimony on Cross

On cross examination, Maddox testified:

That he did not know that IBM typewriters, of the kind stolen, could have been purchased three years earlier, when they were new, for $525.00 each. (R-229-250)

QUESTION ONE: WHETHER PLAIN ERROR INFECTS A DISBARMENT PROCEEDING – RENDERING IT INHERENTLY SUSPECT – FOR PROSECUTORIAL MISCONDUCT PRECLUDING A FAIR TRIAL – WHERE THE ACCUSED ATTORNEY IS KNOWN, PROMINENTLY AS A PLAINTIFFS' ADVOCATE IN PERSONAL INJURIES CASES – AND THE RECORD SHOWS THE PROCEEDING WAS INSTIGATED, AND THE PROSECUTION MANAGED, BY SPECIALLY APPOINTED BAR COUNSEL KNOWN, EQUALLY PROMINENTLY, FOR REPRESENTATION OF INSURANCE COMPANIES IN PERSONAL INJURIES CASES – AND WHERE THE RECORD, FURTHER, SHOWS THAT THE CENTRAL CHARGE AGAINST THE ACCUSED ATTORNEY – viz

MAKING "ADVANCEMENTS" TO CLIENTS – WAS INVESTIGATED AND FRAMED AS WELL AS PROSECUTED, BY SUCH BAR COUNSEL – AND WHERE THE RECORD, FURTHER, SHOWS THAT TWO FORMER CLIENTS OF THE ACCUSED ATTORNEY TESTIFIED IN THE PROCEEDING, AS TO "ADVANCEMENTS" MADE TO THEM – AND WHERE THE RECORD, FURTHER, SHOWS THE APPEARANCE OF SUCH FORMER CLIENTS OF THE ACCUSED ATTORNEY AS WITNESSES AGAINST HIM HAD BEEN ARRANGED BY BAR COUNSEL WHO, BEFOREHAND, HAD SUMMONED THEM, BY SUBPOENA TO HIS PRIVATE LAW OFFICE FOR INTERROGATION AS TO WHAT THEY KNEW AND WOULD TESTIFY TO – AND WHERE THE RECORD, FURTHER, SHOWS THAT IN THE PERSONAL INJURIES ACTIONS BROUGHT BY THE ACCUSED ATTORNEY, ON BEHALF OF SUCH FORMER CLIENTS, BAR COUNSEL HAD BEEN ADVERSARY ATTORNEY OF RECORD FOR THE DEFENDANT INSURANCE COMPANIES – AND WHERE THE RECORD, FURTHER, SHOWS THAT NOTWITHSTANDING HIS PECUNIARY INTEREST IN THE PROCEEDING'S OUTCOME, AS DEMONSTRATED BY ALL THE FOREGO-

ING RECITALS, BAR COUNSEL, ON OBJECTION OF THE ACCUSED ATTORNEY, DECLINED TO CONCEDE IMPROPRIETY AND DISQUALIFY HIMSELF FROM PARTICIPATION IN THE ACCUSED ATTORNEY'S TRIAL – AND WHERE THE RECORD FURTHER SHOWS, THE PRESIDING REFEREE REFUSED TO COMPEL DISQUALIFICATION.

ARGUMENT

This controversy presents, at the threshold, a question, reserved in *Ruffalo*[7], but ripe for adjudication, here, which is to say, whether a disbarment proceeding is infected with the taint of plain error – rendering it inherently suspect – as trenching on an accused lawyer's fair trial guarantee – where the record shows the proceeding was instigated and managed by a Bar counsel, specially appointed for the purpose, who had an obvious pecuniary interest in the proceeding's outcome – by reason of his representation of clients – i.e., insurance companies – who, themselves, had notorious, retaliatory motive for attempting to purge the accused attorney – for his uncommon success as a plaintiffs' advocate in personal injuries cases.

Upon *Ruffalo's* indefinite suspension by the Ohio Supreme Court, Judge Battisti conducted an inquisition – for The Federal District Court, Northern District of Ohio – to de-

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7 *In the matter of John Ruffalo* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222(1968)

termine whether the State Court action was acceptable – under the teachings of *Selling v. Radford*, 243 U.S. 46, 61 L.Ed. 585, 31 S.Ct. 377 (1917) – as an adequate basis for demolition of Ruffalo's Federal Bar credentials. *In re Ruffalo*, 249 F. Supp. 432 (1965)

Judge Battisti refused to recognize and enforce the Ohio suspension – and his refusal, in good part, was premised on his disapproval of the extent to which the proceeding was instigated and managed by The Association of American Railroads – Ruffalo's real adversary in F.E.L.A. cases in which he specialized.

His opinion drew an unappetizing portrait of the activities of the Railroad Association's investigators, saying:

That "From a reading of the entire record of the State disbarment proceedings, particularly the testimony of one Charles S. White, an employee of the Association of American Railroads, it seems clear that the genesis of the disbarment proceedings against . . . (Ruffalo) was an *investigation conducted by agents of The Association of American Railroads*".

That "after the investigation of said association had been completed, the results were turned over to *Attorney Jay Brownlee, then President of The Mahoning County Bar Association*" – who had "appeared, frequently as . . . the representative of the B & O Railroad" in District Court litigation.

That "these charges involved . . . (Ruffalo's) relationship with certain persons *contacted and interviewed by representatives of The Association . . . in the course of its investigation of . . . Ruffalo*".

That "The charges of indications of misconduct in the prosecution of . . . (Ruffalo) in large part arise out of the involve-

ment of the Association in the proceedings".

That "the involvement of the Association . . . in the proceedings was not insignificant, in fact, quite prominent. And, as noted above, *it is evident that the disbarment proceedings grew out of an investigation conducted by said association*".

That "*it seems equally evident, from a review of the entire record, that representatives of the Mahoning County Bar relied heavily upon the work of the said Association in the prosecution of . . . (Ruffalo)*".

That "while it is an obvious truth that the railroads have, over the years, been unjustly injured as a result of unethical practices of some attorneys, and while it is further clear that the railroads have an absolute right to attempt to remedy such injustices, it nonetheless follows that *they should not be permitted to use legal ethics or bar associations as a banner under which to unscrupulously advance their own economic self interests*".

That "*other courts have in the past and will in the future comment adversely upon bar associations or members thereof who become a party to an effort on the part of any special interest group to serve their own interests by or through disciplinary proceedings against members of the Bar.*"

Judge Battisti, in final analysis, did not denounce the proceeding – underlying Ruffalo's State Court suspension – as defective, per se, for impingement upon his fair trial guarantee – because only two, of the fourteen charges, on which he was convicted, by The Board of Commissioners On Grievances, were upheld by the Ohio Supreme Court – and "the evidence with regard to . . . (those, two) charges . . . (was) undisputed and, therefore, untainted by . . . (any) misconduct in the prosecution of the State disbarment proceedings."

Nevertheless, it is plain that Judge Battisti considered the "Ohio . . . proceedings" inherently suspect – by reason of the undesirable influence exercised by the Railroad Association – a consideration that prompted him to scrutinize, skeptically, even the untainted charges.

In an inquiry – independent of Judge Battisti's – The Sixth Circuit concluded it would honor Ruffalo's State Court suspension. *In the Matter of Ruffalo*, 370 F.2d 447 (1966)

The majority opinion made no mention of the prosecutorial misconduct issue – except en passant, saying, that Ruffalo argued "that the Association of American Railroads was guilty of questionable practice in investigating . . . (him) and that the American Railroads historically have unfairly resisted and impeded the presentation of claims by their employees" – but that such an argument, to prevail, would require announcement of "a rule that a lawyer may fight on any level chosen by his adversary . . ."

Nevertheless, it was the specter of that issue, that apparently moved This Court to grant certiorari to review The Sixth Circuit's derivative suspension of Ruffalo. *In the Matter of John Ruffalo* 390 U.S. 815, 19 L.Ed.2d 66, 88 S.Ct. 30 (1967)

What is certain, is that Mr. Justice Douglas' majority opinion – reversing – and ordering restoration of Ruffalo's Federal Bar standing – gave a factual backdrop of the controversy which focused on the questionable role of the Railroad Association – pointing out that Ruffalo "*was an active trial lawyer who handled many Federal Employees' Liability Act cases*" – *and that "The Association of American Railroads investigated his handling of claims and referred charges of impropriety to the President of the Mahoning County Bar Asso-*

ciation who was, also, local counsel for the Baltimore and Ohio Railroad Co." Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968)

Ultimately, however, the question whether the state Court proceeding was "defective" – for abuse by private interests – was pretermitted – and reversal ordered on a ground not asserted, directly, by Ruffalo – i.e., that he did not have fair notice of the charges against him before the proceeding began.

Mr. Justice Douglas' comment on the pretermission was: *"Nor do we stop to inquire whether the proceeding was defective because the Bar Association, the agency that made the charges against . . . (Ruffalo) was headed by counsel for the Baltimore & Ohio Railroad Co., against which . . . (Ruffalo) filed several of his claims.* For there is one other issue of the case which requires reversal."

Notwithstanding that it was not the axis on which the final disposition turned, grant of certiorari in *Ruffalo* – evinced this Court's concern about the constitutional overtones of a disciplinary proceeding – like the instant one against Dawson – resulting from the machinations of "any special interest group." See Judge Battisti's District Court decision in *Ruffalo*, supra.

And there are State Court cases abjuring, in effect, disciplinary proceedings bearing such stigmata. *In re Sizer*, 267 S.W. 922 (Mo. 1924); *In re Rerat* 44 N.W. 2d 273 (Minn. 1950); *State ex rel Turner* v. *Denman* 259 S.W. 2d 891 (Tenn. 1953); *Florida Bar* v. *Murrell* 74 S. 2d 221 (Fla. 1954); *In re Heirich* 140 N.E. 2d 825 (Ill. 1956)

The rule gatherable from Judge Battisti's *Ruffalo* pronouncement – and the array of state court cases – *Sizer, Rerat, Denman, Murrell* and *Heirich* – is that a disciplinary proceeding – seeking professional proscription of an accused attorney – will be deemed, per se, infected with plain error – rendering the proceeding inherently suspect – for prosecutorial misconduct – affronting the accused attorney's constitutional right to a fair trial – where the record shows the proceeding was instigated and managed by the accused attorney's known adversaries, having a patent pecuniary interest in his proscription.

And, the underlying record – as was shown in the Statement of Facts – brings the proceeding – resulting in Dawson's disbarment – within reach of the rule's condemnation.

The truth – put plainly – is that The Florida Bar abused its official power – in permitting prosecution of a disciplinary proceeding against Dawson – as a screen for a clandestine undertaking by his adversaries in personal injuries cases – i.e., insurance companies – to work his professional outlawry – an undertaking calculated to promote his adversaries' pecuniary interest – not the Purity of The Bar.

The moral authority of disciplinary proceedings is devalued by even the semblance of partisan manipulation – and this Court should intervene – in exercise of its conciliar power – to lay down constitutional guidelines designed to safeguard them against future manipulative use.

In fine, as Judge Battisti pointed out in *Ruffalo* – despoilment of the integrity of disciplinary proceedings by means of pretextual charges and subterfuge such as Dawson challenges – here – is a recurring evil – which This Court should declare constitutionally intolerable – as implicating, at least, "the

probability of unfairness" which *Murchison*[8] and the prophylactic rule it propagated in *Ward*,[9] *Barryhill*[10] – and similar cases[11] – were intended to prevent. See too, *Tuney v. Ohio* 273 U.S. 510, 71 L. Ed. 749, 47 S.Ct 437 (1927) *Re Oliver* 333 U.S. 275, 82 L. Ed. 682, 68 S.Ct. 499 (1948)

This Court, Dawson suggests, was prepared to make such a declaration in *Ruffalo* – but reserved it – for a future controversy.

This, perhaps, is that controversy.

QUESTION TWO: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – IS DENIED DUE PROCESS – (1) FOR CONVICTION ON A CHARGE NEVER MADE and (2) FOR CONVICTION UNDER AN EX POST FACTO LAW – WHERE THE COMPLAINT CHARGES HIM WITH MAKING "ADVANCEMENTS" TO CLIENTS IN VIOLATION OF CERTAIN CANONS – BUT WHERE THE REFEREE CONVICTS HIM OF VIO-

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8 *In re Murchison* 349 U.S. 133, 99 L.Ed 942, 75 S.Ct. 623 (1955)

9 *Ward v. Village of Monroeville* 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct 80 (1972)

10 *Gibson v. Berryhill* 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct 1689 (1973)

11 *Commonwealth Coatings Corp v. Continental Casualty Co.* 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct 337 (1968)

LATING AN ENTIRELY DIFFERENT CANON – AND WHERE THE STATE SUPREME COURT, REVIEWING THE CONVICTION, UPHOLDS IT, ON THE THEORY IT VIOLATES NEITHER THE CANONS CHARGED IN THE COMPLAINT, NOR THE CANON INVOKED BY THE REFEREE, BUT AN "ETHICAL CONSIDERATION" MERELY ASPIRATIONAL IN NATURE – AND WHERE SUCH ETHICAL CONSIDERATION WAS NOT IN EXISTENCE AS OF THE DATES ON WHICH THE ALLEGED "ADVANCEMENTS" WERE MADE.

ARGUMENT

Dawson contends that the proceeding against him was ceremonial, only – that his conviction, on one or the other of the pretextual charges, was predetermined – and that the proceeding moved to that predetermined end, mindlessly.

Careful analysis of – the Complaint, the Referee's Report and The Florida Supreme Court's opinion – shows, for example, that, as to "Advancements", Dawson was convicted on a charge never made – under a Canon not in existence – as of the time of the "Advancements".

More specifically, analysis shows:

The Complaint charged:

That – during the period from January, 1969 to November 13, 1972 – when the proceeding was commenced – Dawson "customarily and routinely made monetary advance-

ments to clients for purposes other than expenses of litigation"; – and –

That in making them, he "violated his oath as an attorney, and also violated Rule 11:02 of Article XI of the Integration Rule, *Canons 1 and 5 of the Code of Responsibility* and Rules 27 and 32 of the Additional Rules governing the conduct of lawyers in Florida."

But the Referee's Report – recommended that Dawson "be found guilty of violating his oath of admission, the Integration Rule of The Florida Bar, and *Canon 10 . . . of The Old Canons of Professional Ethics* and Rules 27 and/or 32 of the additional Rules governing the conduct of attorneys in Florida."

The charge and recommended conviction – insofar as they predicate violations of the Oath of Admission, the Integration Rule and Rules 27 and 32 -- may be passed over – without pause – for they, manifestly, are irrelevant boiler plate.[12]

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12 The Oath of Admission, merely, enjoins Florida attorneys "to support the constitution of the United States and the State of Florida – and to eschew Communist party membership" – an injunction, it cannot be said, Dawson, violated. (See Rule 11:02 (1) of the Integration Rule.)

Rule 11:02 of the Integration Rule is, merely, a general statement of "principles . . . (which) shall govern conduct of members of The Florida Bar" . . . none of which has been invoked, specifically, against Dawson.

And Rules 27 and 32 are too vague to support a conviction for unauthorized "advancements" – Rule 27 providing, that "It shall be the duty" – of all members of The Florida Bar not to "Be guilty of any deceit or wilful misconduct, and Rule 32 providing that "Any attorney

The noteworthy thing – constitutionally speaking – is that the complaint charged violations of Canons 1 and 5 of The Code of Professional Responsibility–which, respectively, command that "A Lawyer should assist in manifesting the integrity and competence of the Legal Profession" and that "A Lawyer should exercise Independent Professional Judgment on Behalf of a Client" – while the Referee's Report found guilt on the basis of a violation of old Canon 10 commanding that "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting".[13]

The Referee, accordingly, convicted Dawson on a charge never made, constituting "a sheer denial of due process"[14]

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12 (Continued)
who shall do or be guilty of any of the acts forbidden or prohibited by law or rules of Court may be subject to disciplinary action by public or private reprimand, or by suspension and disbarment therefrom". (See Professional Ethics, Selected Opinions of The Committee on Professional Ethics of The Florida Bar, pages XXVIII through XXXI)

13 See Professional Ethics, Selected Opinions of the Professional Ethics Committee, The Florida Bar, 1959 - 1967, Appendix XII.

14 As will be dealt with, more particularly, infra, The Referee – as a matter of conjecture – may have renounced Canons 1 and 5 because he thought them too "Draconian" to be relied on – but, more probably, he was aware that there was no competent evidence, in the record, that Dawson had made an "advancement" after May 1, 1970 – when Pryor received $100.00 – making Canons 1 and 5 inapplicable – since they were not adopted until October 1970, *In Re The Integration Rule of The Florida Bar* 235 So.2d 723 (Fla, 1970)

Ex Parte Bradley 7 Wall 364, 19 L.Ed 214; *In Re Bennethum* 196 F.Supp. 541 (D.Del. 1961); *DeJonge v. Oregon* 299 U.S. 353, 57 S.Ct 255, 81 L.Ed 278 (1936); *Cole v. Arkansas* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed 644 (1948)

The surpassing constitutional grotesquery, however, is that The Florida Supreme Court approved Dawson's conviction and disbarment on the theory he had violated Ethical Consideration 5-8 – neither charged in the Complaint – nor mentioned in the Referee's Report – and which has to do with advances to clients in the form of loans.[15]

The "Preliminary Statement" to The Florida Bar's Code of Ethics declares, expressly, that "The Ethical considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." – which suggests they are hortatory, rather than mandatory, and, therefore, infirm, organically, to underpin a disciplinary proceeding.

But, in all events, Dawson was not charged with an offense against Ethical Consideration 5-8 – and The Florida Supreme Court, a fortiori, convicted him on a "charge never made". *Ex Parte Bradly*, supra; *In Re Bennethum*, supra; *DeJonge v. Oregon*, supra; *Cole v. Arkansas*, supra.

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15 EC 5-8. A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although the assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

Moreover, the record is barren of competent evidence that Dawson made an "Advancement" to a client subsequent to May 1, 1970[16] – and Ethical Consideration 5-8 was not adopted until October 1, 1970 – *In Re Integration Rule of The Florida Bar* 235 So.2d 723 (Fla.1970) from which it follows, automatically, that he is in peril of punishment under an ex post facto law – proscribed by Article 1, Section 10 of the Constitution. *Cummings* v. *Missouri* 4 Wall 277, 18 L.Ed. 356, (1867); *Boute v. Columbia* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)

QUESTION THREE: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – IS DENIED DUE PROCESS – FOR WANT OF FAIR NOTICE THAT HIS ACTS MIGHT BE DEEMED PROFESSIONAL MISCONDUCT WARRANTING DISBARMENT – WITHIN THE MEANING OF MR. JUSTICE WHITE'S CONCURRING OPINION IN *RUFFALO* – WHERE THE ACCUSED ATTORNEY IS

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16 Joan Clark testified that while employed by Dawson, during the period from August 1969 to March 1971, she saw "Advancements" made (R-152) but her testimony was incompetent, clearly, because in the course of discovery The Bar limited its proof, as to "Advancements" to those made to Pryor and Mrs. Whatley (R-153-157) about which Ms. Clark knew nothing. Assuming, arguendo, her testimony was competent, nonetheless it was devoid of evidentiary value for her inability, admitted by her, to identify, specifically, the date, time, place or amount of a single "advancement" – nor the identity of a client to whom one was made. (R-229-232)

Thus, the record shows, conclusively, that the last "advancement" made by Dawson - and proved at trial – was made to Pryor at a date no later than May 1, 1970 (R-67-70)

CHARGED AND CONVICTED OF MAKING "ADVANCEMENTS" TO CLIENTS – NOTWITHSTANDING THAT AT THE TIME HE MADE THEM, THEY WERE NOT CONDEMNED AS UNAUTHORIZED UNDER THE SETTLED DECISIONAL LAW OF THE SUBJECT JURISDICTION, NOR MOST AMERICAN JURISDICTIONS, GENERALLY.

ARGUMENT

At the time of the advancements to Pryor and Mrs. Whatley, in 1970, Dawson had no reason to believe they violated the professional canons – but, to the contrary, had good reason to believe them blameless – inasmuch as the general rule in American Jurisdictions – and the settled decisional law of Florida – made up, in part, of a landmark case involving Dawson, himself – declared that an attorney might make ""advancements" to clients in the form of loans – including those made, in modest amounts, for "living costs" for indigent or necessitous clients – in the absence of any showing that they were made to induce employment or prevent discharge – a showing not made here. *Florida Bar* v. *Dawson* 111 S.2d 427 (Fla. 1959); *Florida Bar* v. *Rhubottom* 132 So.2d 395 (Fla. 1961)

In 1957, Dawson was convicted – and suspended from practice for eighteen months, on a charge, inter alia, of "entering into agreement that he would bear all expenses in the event of no recovery in particular matters *in consideration of his professional employment by the people involved*". See *Florida Bar* v. *Dawson*, supra. Page 428

The Florida Supreme Court upheld the conviction on the theory that the agreements were made as in advancements, to "potential clients to employ . . . (Dawson) . . . professionally".

But the Court disavowed, expressly, any intention to interdict post-employment "advancements" not made as "promises" or "conditions to obtaining emplo ment".

In *Rhubottom* – what might be called the rule in *Dawson's* case – was elasticized to prohibit "advancements" "for the purpose of preserving employment" – the Court opining that "While it does not appear that . . . Rhubottom used his agreement . . . as inducement to obtaining employment" – and while "We did say in . . . *Dawson* . . . that a lawyer is not prohibited from a good faith advance of expense in the course of litigation as a matter of convenience" – still . . . "this does not contemplate the investment of large sums of money both in litigation costs and living costs . . . for the purpose of preserving employment" – since "We can detect little difference between promising money to get a client and paying out large sums to retain one". *Florida Bar* v. *Rhubottom*, supra. Page 399.

Both Pryor and Mrs. Whatley testified the monies they received had no relationship to their decisions to employ Dawson – nor to continue his employment.

The Referee, nonetheless, convicted Dawson of a Canon 10 violation.

The Referee voted to convict on two legal assumptions – (1) That advancements for "living costs" are not authorized per se, and (2) That failure to prosecute claims for reimbursement of advancements made in losing causes – establishes impropriety, retrospectively, as it were –

And both those assumptions were erroneous under Florida law and the general law – and Dawson had no reason to believe he would have to reckon with them in assessing whether the "advancements" to Pryor and Mrs. Whatley were proper or improper.

For example, in *Rhubottom* – where the question was presented, squarely, "advancements" for "living costs" were not condemned – as such – and a reading of the opinion in that case, by Dawson, would not have informed him fairly that he would have to avoid advancements for similar purposes – but, rather would have informed him that they were permissible – if not so excessive and pervasive as to indicate a corrupt intent to buy clients.

Moreover, the majority rule is that "advancements" made to disabled, destitute clients for "living costs" do not violate Canon 10 – forbidding lawyers from acquiring a pecuniary interest in litigation they handle – nor Canon 42 – forbidding lawyers from bearing "the expense of litigation" but authorizing "good faith" advances of "expenses as a matter of convenience subject to reimbursement". *Dambey Tyler & Grieser* v. *Detroit I & I R Co.* 351 F.2d 121 (6th Cir. 1965); *In re Sizer*, supra. *People ex rel Chicago Bar Association* v. *McCallum* 173 N.E. 827 (Ill. 1930)

And, ironically, Dawson's conviction – per Canon 10 – on the assumption he should have known "advancements to his clients for purposes unrelated to the conduct of . . . litigation" – viz for "living costs" – were illegitimate – attributes to him a higher order of intelligence and discernment than possessed by Judge Battisti who wrote the District Court opinion in *Ruffalo* – and Judge Edwards who wrote a dissenting opinion in *Ruffalo*, in the Sixth Circuit – both of whom cited the Florida Supreme Court's 1959 *Dawson* decision as illustrative of the general rule that "advancements" for purposes other than the actual cost of litigation are not objectionable unless known to be "a general practice employed . . . so as to become widely known and hence to constitute an economic attraction for potential clients . . ." a showing not made against Dawson on the basis of the trifling sums advanced to Pryor and Mrs. Whatley.

Neither could Dawson have believed, reasonably, that he hazarded his professional career in failing to demand – or sue for – reimbursement from Pryor and Mrs. Whatley after their cases were lost.

There is no Florida case that speaks to such a proposition – and the near universal rule, in other jurisdictions, is to polar effect, which is to say, that, generally, "advancements" are made to disabled, indigent clients – of which Mrs. Whatley is typical – and to refuse them "advancements" – as bad "credit risks" vis-a-vis future reimbursement, should they lose their law suits, would be to deny them, effectively, the opportunity to enforce their claims and "obtain justice". *In re Ruffalo* 249 F.Supp 432 (N.D. Ohio 1946); *In re Sizer*, supra; *People ex rel Chicago Bar Association* v. *McCallum*, supra; *Grievance Committee* v. *Nevos* 96 A.2d 802 (Conn. 1963)

Bar Counsel, in words or effect, conceded the Pryor-Whatley loans, or "advancements", did not violate Canon 10, as interpreted by The Florida Supreme Court – prior to October, 1970, when the Code of Professional Responsibility was adopted. (R-447-448)

Probably, as suggested earlier, the Referee convicted Dawson of violating "Old Canon 10" despite Bar Counsel's concession – because the Referee knew the Code of Responsibility did not come into being until subsequent to the Pryor-

Whatley "advancements" – and that Dawson had to be convicted per Canon 10, or not at all – whether consistent with precedent, or not.

The Referee overlooked, however, that the result of the Canon 10 conviction, was to deprive Dawson of due process – for want of fair notice – within the meaning of Mr. Justice White's concurring opinion in *Ruffalo*, in that Dawson cannot be "deemed to have been on notice that the Court would condemn the conduct for which he was . . . (disbarred)."

It was, perhaps, the "fair notice" infirmity – as articulated by Mr. Justice White – that prompted the Florida Supreme Court to reject the Referee's Canon 10 finding – and approve Dawson's conviction under Ethical Consideration 5-8, which purports to discountenance loans to clients except in certain circumstances.

Of course, as discussed under Question Two, switching the predicate of the conviction from Canon 10 to Ethical Consideration 5-8 collided with Article I, Section 10 – prohibiting ex post facto laws. Admittedly, the language in EC 5-8 is at the least ambiguous, and, together with the decision in the case of **Fla. Bar v. Dawson, 111 So.2d 427 (1959)**, together with the general laws of the United States shows clearly that reasonable men could differ in their interpretations and as was so amply said in the opinion of Mr. Justice Hardan, concurring opinion by Mr. Justice White, joined by Mr. Justice Marshall in *Ruffalo*, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222

> "I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct."

QUESTION FOUR: WHETHER AN ACCUSED ATTORNEY – IN A DISBARMENT PROCEEDING – CHARGED WITH "CUSTOMARILY AND ROUTINELY" MAKING "MONETARY ADVANCEMENTS – TO CLIENTS FOR PURPOSES OTHER THAN EXPENSES OF LITIGATION" DURING A THREE AND A HALF YEAR PERIOD – TERMINATING AS OF THE DATE THE DISBARMENT PROCEEDING WAS COMMENCED – IS VICTIMIZED BY DENIAL OF DUE PROCESS – FOR LACK OF EVIDENCE IN THE RECORD TO SUPPORT A RATIONAL CONCLUSION OF GUILT – WITHIN THE MEANING OF *SCHWARE*[15] AND *THOMPSON*[16] WHERE THE EVIDENCE CONSISTS, ENTIRELY, OF THE TESTIMONY OF TWO FORMER CLIENTS AND A FORMER EMPLOYEE OF THE ACCUSED ATTORNEY – AND WHERE THE TESTIMONY OF ONE OF THE FORMER CLIENTS WAS THAT HE RECEIVED ONE "ADVANCEMENT" OF ONE HUNDRED ($100.00) DOLLARS ON A DATE TWO AND A HALF

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15 *Schware* v. *Board of Bar Examiners* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1959)

16 *Thompson* v. *Louisville* 362 U.S. 199, 808 S.Ct. 624, 4 L.Ed.2d 654 (1963)

YEARS PRIOR TO COMMENCEMENT OF THE DISBARMENT PROCEEDING – AND WHERE THE OTHER FORMER CLIENT'S TESTIMONY WAS THAT SHE HAD RECEIVED ADVANCEMENTS OF FIFTY DOLLARS PER WEEK – FOR "ABOUT TWO MONTHS" – WHILE SHE WAS DISABLED TO WORK – AND SUCH ADVANCEMENTS WERE MADE TWO AND A HALF YEARS PRIOR TO COMMENCEMENT OF THE DISB .R-MENT PROCEEDINGS – AND WHERE THE FORMER EMPLOYEE'S TESTIMONY WAS THAT SHE OBSERVED WEEKLY ADVANCEMENTS MADE TO CLIENTS WHOSE NUMBER SHE COULD NOT "BEGIN TO GIVE . . . AN IDEA" OF – BUT MIGHT HAVE BEEN "A HUNDRED, A COUPLE OF HUNDRED" – ALTHOUGH SHE DID NOT RECALL THE NAME OF A SPECIFIC CLIENT TO WHOM – NOR A SPECIFIC DATE ON WHICH–AN "ADVANCEMENT" WAS MADE – NOR THE PURPOSE FOR WHICH IT WAS MADE – AND WHERE BOTH FORMER CLIENTS TESTIFIED THAT THE "ADVANCEMENTS" HAD BEEN MADE TO THEM SUBESEQUENT TO THEIR EMPLOYMENT OF THE ACCUSED ATTORNEY – AND THAT SUCH "ADVANCENEY – AND AND THAT "ADVANCE-

MENTS" HAD NO CONNECTION AT ALL, WITH THEIR DECISION TO EMPLOY HIM – NOR TO CONTINUE HIS EMPLOYMENT.

ARGUMENT

Schware[17] holds, without sophistry, that a lawyer may not be anathematized where "There is no evidence in the record which rationally justifies a finding that . . . (he is) morally unfit to practice law" – a holding enlarged upon in *Thompson*[18] to mean that "Just as conviction upon a charge never made would be a sheer denial of due process 'it is a denial of due process' to convict and punish a man without evidence of his guilt."

Dawson's conviction – on the "advancements" charge – cannot be reconciled with *Schware* and *Thompson*.

He was charged, it must be repeated, with "customarily and routinely" making "advancements" during a period of four years – from January 1, 1969 to the date the Complaint was filde on November 13, 1972 – but the competent evidence, in the record, consists, entirely, of the testimony of Pryor – who testified that he – while disabled – received a solitary "advancement" of one hundred ($100.00) dollars[19] – made to him in April or May 1970 (R-37-38) which had no connection with his employment of Dawson (R-43) – and the

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17 1 L.Ed.2d at 806.

18 4 L.Ed.2d at 659.

19 Pryor was, also, advanced twenty-four ($24.00) dollars to pay a doctor's bill (R-39) but The Bar did not challenge its propriety.

testimony of Mrs. Whatley – who testified that she – while disabled – received what she called "salary replacement" checks of fifty ($50.00) dollars each – for eight weeks – ending about March 1, 1970[20] – which had no connection with her employment of Dawson – and which she was told she would have to repay from the proceeds of her personal injury action. (R-66-70, 83-85)[21]

In sum, then, in support of the charge that Dawson "customarily and routinely made advancements to clients" – for a four-year period – terminating on November 13, 1972 – The Bar's sole proof was that he made isolated "advancements" to two clients – more than two and one-half years prior to November 13, 1972.

If *Schware* and *Thompson* mean what they say – Dawson's conviction – on the "advancements" charge – cannot be sustained.

QUESTION FIVE: WHETHER AN ACCUSED ATTORNEY – IN A DISCIPLINARY PROCEEDING – MAY BE CONVICTED

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20 Mrs. Whatley was uncertain as to the exact dates of the "advancements" to her – except that they began about a month after she employed Dawson – which was in the last week of December, 1969, or the first week of January 1970 – and continued for eight weeks, which means, necessarily, that the last was received on or about March 1, 1970.

21 Joan Clark testified that she had seen "advances" made while she worked as a secretary to Dawson from August 1969 to March 1971 – but her testimony, if not incompetent, had no probative value for the reasons given in footnote 16, supra.

AND DISBARRED – CONSISTENT WITH *SCHWARE* AND *THOMPSON* – ON A CHARGE OF "RECEIVING STOLEN PROPERTY" – NOTWITHSTANDING A CONCESSION BY THE STATE COURT, OF FINAL REVIEW, THAT THE EVIDENCE WAS SO "CIRCUMSTANTIAL AND UNCONVINCING THAT IT WOULD NOT WARRANT CONVICTION AND DISBARMENT" – EXCEPT CONSIDERED, CUMULATIVELY, WITH ANOTHER "PROVEN CHARGE".

ARGUMENT

The Complaint charged – in Count IV – that Dawson, knowingly, received and concealed three stolen typewriters – but the thief – McGee – testified he did not tell Dawson they were stolen (R-102, 107-109, 116-118) – and that Dawson bought two of them, reluctantly, and ordered him "to go back and get" the third. (R-116-118)

The Referee convicted Dawson, nevertheless, reasoning that he should have known their origin. (A - 25)

The Florida Supreme Court confessed, however, that the evidence was so "circumstantial" and tenuous that "We would not be inclined to disbar . . . (Dawson) if this were the only offense with which he had been charged. Taken with the other *proven charge* . . . (as to advancements) we believe the public will best be protected if . . . (Dawson) is denied continued permission to engage in the practice of law in Florida."

When it is considered that the burden of proof required in a Florida disciplinary proceeding is "clear and convincing evidence", only[22] – and that the evidence, against Dawson, was too frail to satisfy even that requirement – his conviction, perforce, was constitutionally impermissible – under *Schware* and *Thompson*.

QUESTION SIX: WHETHER THE SIXTH AMENDMENT GUARANTEE – THAT *"IN ALL CRIMINAL PROSECUTIONS,* THE ACCUSED SHALL ENJOY THE RIGHT TO A . . . PUBLIC TRIAL, BY AN IMPARTIAL JURY" . . . TOLERATES A SECRET TRIAL WITHOUT A JURY – IN A *QUASI-CRIMINAL PROSECUTION*, THAT IS: IN A DISBARMENT PROCEEDING–MOST PARTICULARLY, WHERE AS HERE, THE ACCUSED ATTORNEY – IN SUCH A PROCEEDING–IS CHARGED AND CONVICTED OF THE COMMISSION OF A CRIME–i.e., "RECEIVING STOLEN PROPERTY" – NOTWITHSTANDING **THAT A COURT COMPETENT JURISDICTION,** PREVIOUSLY, HAD ENTERED A NOLLE PROSEQUI DISMISSAL – IN THE ATTORNEY'S FAVOR – AS TO THE SAME, ALLEGED CRIMINAL TRANSACTION – FOR WANT OF EVIDENCE.

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22 *Florida Bar* v. *Rayman* 238 So.2d 574 (Fla. 1970)

ARGUMENT

Dawson requested a Jury trial – when he appeared before the Referee and raised the denial, as error, on his appeal to the Florida Supreme Court, futilely.

And he grants that *Ex Parte Wall* 107 U.S. 265, 27 L.Ed. 552, 2 S.Ct. 569 (1883) looms as a barrier to assertion of the right to Jury trial in disciplinary proceedings.

Wall, however, was decided at an antique time, when lawyers, virtually, were men without a constitution.

And *Wall's* premises have been swept away.

One of those premises – that disciplinary proceedings should be deemed inquisitorial in nature – was undone by *Spevack*[23] and *Ruffalo* – re-classifying them "adversarial".

Another premise was that disbarment "is not a criminal proceeding and not intended for punishment" – a premise, also overthrown by *Spevack* – denominating disbarment, essentially, penal in purpose – and *Ruffalo* declaring *"These are adversary proceedings of a quasi-criminal nature."*

Indeed, this Court's, systematic and progressive, judicial drive – as unfolded in *Schware*, *Willner*[24], *Spevack* and *Ruffalo* – has been to mantle lawyers – in disciplinary proceedings – with the Commandments of the Fifth and Sixth Amendments – and withholding the right to Jury trial can be justified, only, on the preconception that it is of lesser constitutional dignity.

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23 *Spevack* v. *Klein* 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967)

24 *Willner* v. *Committee on Character & Fitness* 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)

Mr. Justice Field's impassioned dissent – in *Wall* – will be vindicated, sooner or later.

And this Court's new militance – in defense of equal justice for lawyers – speaks for vindication, now.

WHEREFORE, Dawson prays that this Court will issue a Writ of Certiorari to the Supreme Court of Florida to review the Judgment of Disbarment against him.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ..... day of September, 1975, the Original of the foregoing has been furnished the Clerk of the Florida Supreme Court, and a copy furnished to David G. McGunegle, Assistant Staff Counsel for the Florida Bar.

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